


TOWN OF HERNDON

Enriching the Quality of Life and Promoting a Sense of Community



CONFIDENTIAL MEMORANDUM

To: Honorable Mayor and Members of Town Council
From: Richard B. Kaufman, Town Attorney 
Date: July 31, 2008
Re: Ordinance to Prohibit Loitering by Day Workers

Confidential: Attorney-Client Privilege

I.

I will here provide legal advise to support the Mayor and Town Council's discussion of the Watts bill¹ that allowed towns, cities, and VDOT (for most county roads) to prohibit loitering "in any portion of the right-of-way of any highway where loitering has been determined by ... the local governing body of any ... towns to present a public safety hazard and on which ... the ... town has posted signs prohibiting such action. Any person violating the provisions of this section shall be guilty of a traffic infraction."² Generally, a traffic infraction is punishable by a fine of up to \$250.

II.

To effectuate this new authority, I recommend that the Town Council adopt an ordinance after a public hearing. The ordinance should designate with engineering certainty the "portion of any highway where loitering has been determined by the ... town to present a public safety hazard." The ordinance should, based on evidence presented by the Herndon Police Department, other Town staff, and citizens, make factual findings to document the public safety hazard caused by day workers. The ordinance should direct the posting of signs prohibiting loitering and specify the language of the sign. Please see a draft ordinance attached to this report.

¹ HB 470 (Watts) (2008).

² §46.2-930, Code of Virginia (1950) as amended.

III.

The central questions involved in the area of this new authority are the definition of loitering and whether the day workers or others standing around on the designated street are loitering.

I wrote in 2002 on the first subject as follows:

The General Assembly by statute authorizes the Town "to prohibit loitering in, upon or around any public place whether on public or private property" Blacks Law Dictionary at 1092 (1968) defines "loitering" as "to stand idly around" The Virginia Supreme Court upheld such an early loitering ordinance. Yet, many courts have invalidated loitering ordinances. The main grounds of invalidation holds that the loitering ordinances violate due process of law or free expression rights because they are so vague that the public does not know what is illegal or are so broad that even innocent conduct is rendered illegal. Loitering ordinances can be held to violate due process of law guarantees when unlimited discretion is vested in enforcement officers.

The United States Supreme Court held that general loitering ordinances are void on due process grounds for vagueness and over breadth and suggested that loitering ordinances tied to some criminal violation such as blocking the street may be legally sustainable. The Supreme Court held that people enjoy a constitutional right to just stand around and that a bare loitering ordinance may not proscribe such conduct.

... Finally, no loitering ordinance would prevent or eliminate the day worker site. The individuals who wait for work are not loitering. Any loitering ordinance may help with some of the external manifestations at the present day worker site of the persons who are not waiting for work and who gather for unlawful purposes described in the ordinance.

The Town does not have a general loitering ordinance, though the Town Council may adopt one.³ In drafting the attached street loitering ordinance, I have used the definition of loitering from the City of Norfolk.⁴ This ordinance "prohibits loitering in a fashion not usual for a law abiding person under circumstances giving rise to a reasonable concern for the safety of persons and property in the immediate vicinity."⁵

³ § 15.2-926, Va. Code.

⁴ §29-73, Norfolk City Code.

⁵ Email dated July 2, 2005 from Mr. Cloud, Deputy Norfolk City Attorney to Mr. Kaufman.

IV.

I would not recommend use of this street loitering ordinance against normal day workers or group of day workers. From a legal standpoint, I would recommend use of the street loitering ordinance only where the person or people standing idly around are engaging in some objective criminal or objective dangerous or unsafe conduct.

I conclude that the Watts bill is unconstitutional for the legal reasons set out above. I do not recommend the Mayor and Town Council's use of this authority. I recommend that the Mayor and Town Council seek a bill in the 2009 General Assembly to amend the Watts bill statute to render it constitutional. I would draft such a bill to remove the legally troublesome word "loitering" and focus on specific behaviors that cause public safety hazards in streets.

attachment

draft ordinance

RBK/cmh

w/copy of attachment

- c. Arthur A. Anselene, Town Manager
Toussaint E. Summers, Jr., Col., Chief of Police
Elizabeth M. Gilleran, Director of Community Development
William R. Edmonston, Senior Community Inspector
Viki L. Wellershaus, Town Clerk

TOWN OF HERNDON, VIRGINIA

Ordinance

_____, 2008

Ordinance - Amending Herndon Town Code (2000), as amended to adopt a new section prohibiting loitering on streets in such a manner as to cause a public safety hazard.

BE IT ORDAINED by the Council for the Town of Herndon that:

1. Herndon Town Code (2000), as amended, is amended and reordained by the addition of new §46-36, Loitering on streets as follows:

Sec. 46-36. Loitering on streets.

- (a) Town Council finds that:
 - (i) On the public streets of Elden Street (between Sterling Road west to Herndon Parkway) and Alabama Drive from Autumn Place east to Arkansas Avenue (the area) is the location of incidents of loitering in the streets including private streets, sidewalks, and service drives.
 - (ii) The Town Council is aware of the following such incident[s] that have occurred within calendar year 2008:

<u>Date</u>	<u>Address</u>	<u>Facts</u>
April 26, 2008	1001 Alabama Drive	Pedestrian hit by car.

- (iii) The Town Council determines based on [these] incident[s] that this loitering causes a public safety hazard.
 - (iv) The Town Council intends to use the authority of §46.2-930, Virginia Code to prohibit loitering in the area and further to inform the citizens of this prohibition by the posting of signs on the streets to prohibit loitering in any portion of the public right of way where loitering has been determined by the Town Council to present a public safety hazard and on which the Town Council has posted signs prohibiting such action.
- (b) Pedestrians shall not loiter on any bridge or in any portion of the right-of-way of any highway where loitering has been determined by the Town Council to present a public safety hazard and on which the Town Council has had posted signs prohibiting such action.

- (c) These definitions shall apply in the administration of this section:

Loitering means to stand idle, to loaf, to saunter, to delay, to linger, to lag behind, or to walk about aimlessly in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that (i) warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity, or (ii) warrant a justifiable and reasonable conclusion that objective criminal conduct is taking place by the persons involved.

Highway means street as defined in §1-3 of this code.

Public safety hazard means circumstances where specific and articulable facts, taken together with rational inferences from those facts, reasonably warrant a finding that a breach of the peace is imminent or the public safety is threatened.

- (d) Any person violating the provisions of this section shall be guilty of a traffic infraction and upon conviction punished as set forth in §46.2-113, Code of Virginia.
- (e) The town manager shall post signs in the area to prohibit loitering. The signs shall state: "Standing or remaining in this location presents a public safety hazard and is prohibited."
2. This ordinance shall be effective on and after the date of its adoption for violations occurring on and after that date.